Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SUSANNA SHAW,

Petitioner

v.

DAVID REPLOGLE, AND THE LAW OFFICES OF DAVID REPLOGLE, A PROFESSIONAL CORPORATION

On Petition For Writ Of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review - Rule 14.1(a)

Is there an exception to decisions in bankruptcy which are subject to res judicata where it involves a debtor who has raised a legal malpractice counterclaim at an attorney fee application hearing both in writing and orally, which is then informally adjudicated, but the court did not order Federal Rule of Bankruptcy Procedure 7013 be applied to the fee application which would have formally turned it into an adversarial proceeding? If the court does not do this is the debtor then free to file an adversarial proceeding to address the damages from attorney's negligence?

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Epstein v. Visher, 1998 WL 403339 (9th Cir.), 152 F.3d 924
Iannochino v. Rodolakis, 2001 WL 224547, 242 F.3d 36
Interlogic-Trace v. Ernst + Young, 2000, 200 F.3d 382

Jurisdiction of the Supreme Court

The United States Supreme Court according to Rule 10(a) of the Rules of the Supreme Court of the United States has the jurisdiction when an United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter.

Statement of the Case

The debtor filed a Chapter 11 on March 28, 1998 to handle a relatively small problem but because of the attorney's inaction during a critical period, to secure an agreement with a creditor, the case became bitterly contested and debtor almost lost everything. When debtor filed a legal malpractice counterclaim at a fee application hearing the court persuaded debtor to accept an informal adjudication. The court found in the attorney's favor, relying heavily on a suspicious letter attorney had submitted.

Debtor then filed a legal malpractice action to address the damages. The fee application hearing had only involved fees. The attorney filed a motion for summary judgement claiming the matter had been adjudicated in the fee application process. Judge Carlson granted the motion. Debtor appealed to the district court and Judge Breyer reluctantly affirmed summary judgement. Both judges relied on the Ninth Circuit's main ruling in this area, Epstein v. Visher, 1998. Judge Carlson was also the bankruptcy judge who had presided over that case.

Then debtor found two other circuit court cases which said that a judge would have to cite Rule 7013 of the Federal Rules of Bankruptcy Procedure and have it apply to the fee application in order to subject a legal malpractice counterclaim to res judicata. Debtor appealed to the Ninth Circuit which relied on Judge Carlson's ruling.

PETITION

Important exceptions to decisions in bankruptcy which are subject to res judicata are provided in two circuit court rulings, Iannochino v.Rodolakis, 5th Cir., 242 F.3d 36, 2001 and Interlogic-Trace v. Ernst and Young, 1st Cir., 200 F.3d 382,2000, but is not included in the main decision by the Ninth Circuit on this matter, Epstein v Visher, 1998 WL 403339

The exceptions noted in the First and Fifth Circuit court decisions apply in petitioner's case. The Epstein v. Visher case, which does not contain this information, continues to be relied on in courts under Ninth Circuit jurisdiction. Judge Charles Breyer of the district court and Judge Thomas Carlson of the bankruptcy court both cited this decision in their rulings on petitioner's case. Many thousands of people in chapters 7, 11 and 13 lose the valuable opportunity and right to recover their losses.

All three United States court of Appeals cases have to do with persons, or companies, in bankruptcy, who had either objected, citing no specific reason, or failed to object, in their attorney fee application hearings, or as in the IT v. Ernest and Young case, the accounting firm's fee application hearing. After their cases were closed they filed malpractice claims against their former attorneys in state court. The attorneys and accounting firm removed it back to the bankruptcy court where it was eventually found that they'd had the opportunity to raise the malpractice counterclaim during the original fee application hearing so now their claim was barred by res judicata.

The First and Fifth Court rulings reached the same finding about the debtors in those cases as the Ninth Circuit, but they also discussed the exceptions to decisions which are subject to res judicata and what would or could have happened had the debtors raised their malpractice counterclaims during the fee application hearing, which petitioner did.

As Judge Breyer noted, petitioner did raise the issue of professional negligence both in the original written objec-

tion to attorney's fees and verbally during the hearing which followed (please see Breyer decision).

The Iannochino ruling addressed the exceptions to decisions subject to res judcata in the lengthiest manner.

The first exception is when a debtor does raise the legal malpractice claim during the fee application process, that in order to "subject the counterclaim to re judicata," the judge would order that rule 7013 be applicable to the fee application (Iannochino):

> "Alternatively, the bankruptcy court could have ordered Rule 7013 applicable to the fee application, again subjecting the counterclaims to res judica ta.....See Fed. R. Bankr.P. 9014 (allowing the bank ruptcy court " at any stage in a particular contested manner to direct that one or more of the rules applicable to adversarial proceeding apply").

If the Fee application proceeding was not formally changed into an adversarial proceed, by the court ordering that Rule 7013 be applied to the fee application, then any decision the court makes is confined to the fee application dispute and the debtor is free to address the malpractice counterclaim. It does not matter if the counterclaim is adjudicated in any form.

The Interlogic-Trace v. Ernst & Young ruling is clearer on the issue where a malpractice counterclaim has been raised at a fee application hearing without a monetary figure cited for damages, as was petitioner's case (see Interlogic-Trace ruling);

> "...Thus even if IT had only informed the bankrupt cy court of its concerns and not sought affirmative relief for malpractice, the bankruptcy court could have stayed the fee hearing and permitted time for discovery and development under the procedures available in part VII of the Bankruptcy Rules."

An attorney's fees are often only a small portion of the damages the attorney may have caused, as in the petitioner's case ten percent. By ordering Rule 7013 be applicable to the fee application the court can consider all the damages at once. If the rule is not applied the debtor is then free to file an adversarial proceeding to address the malpractice counterclaim.

It does not matter if the counterclaim is adjudicated in any form in the fee application dispute. At the fee application hearing on July 30, 1999 petitioner appeared after filing the written objection. Petitioner was wary of court, expressing concerns that the court would not be objective. Bankruptcy Judge Montali then assured petitioner a trial but gave no indication that it would involve anything other than fees. He did not mention Rule 7013. He was disparaging of a trial and also offered petitioner an informal adjudication. Petitioner accepted. Former counsel was to submit a written response to the objection, then petitioner would respond in writing and the court would render a decision with no further hearings. Judge Montai granted the fees based largely on a suspicious letter the attorney claimed he'd faxed to the crucial creditor (a later deposition with the creditor established she had never received the facsimile).

Petitioner subsequently filed a lawsuit against former counsel for the legal malpractice counterclaim, This was a legitimate filing because even though Judge Montali had already made a decision on the claim he had not ordered that Rule 7013 be applied to the fee application dispute to properly address the matter of damages which was close to $300,000. Petitioner had gone into real estate in 1988 and has four properties including a condominium complex. The chapter 11 filing was a result of a relatively small lawsuit settlement but a bitterly contested case ensued after an agreement was not properly solidified, plunging petitioner into a desperate struggle to save the properties.

Petitioner found the two other circuit court rulings after Judge Breyer's decision. Judge Breyer affirmed Judge Carlson's summary judgement ruling but expressed his frustration (Breyer decision):

> "...If this court (or Bankruptcy Judge Carlson) had presented with Shaw's claim in the first instance, it may well have reached a different result. After all, Shaw's allegations, if true, raise serious concerns about the quality of Replogle's representation. As a matter of first impression, this court would not be able to grant summary judgment to Replogle

> because there would be a genuine issue of material fact as to whether Replogle properly contacted the attorneys for Shaw's Creditors in late September and early October 1998."

The Ninth Circuit ruling in petitioner's case did not discuss the two other circuit court decisions. They did not read Judge Breyer's decision, they stated "We independently review the bankruptcy court's decision without deference to the district court." Judge Carlson was the same Judge who presided over the Epstein v. Visher case in 1997.

In petitioner's case the Ninth Circuit cited the term issue preclusion, which was the same reasoning it had used in Epstein v. Visher, but in this case the exceptions to decisions in bankruptcy which are subject to res judicata would also include collateral estoppel and issue preclusion.

Actually Epstein v. Visher was a case which probably should have been treated differently by the judge. In Iannochino v. Rodolakis the Iannochinos had not even appeared at the fee application hearing. In Interlogic-Trace v. Ernst & Young the debtors had decided not to object at the hearing. The Epsteins did object at the hearing, they had not used the term legal malpractice but the quality of their attorney's services was clearly being called into question.

Judge Carlson could have ordered rule 7013 be applied to the fee application but he did not. This would have subjected their claim to res judicata. Petitioner did clearly state the malpractice counterclaim.

This case is very important - nine states are effected and many people encounter unforeseeable problems and have to seek bankruptcy protection in chapters 7, 11 and 13. They shouldn't lose a valuable right to recover lost monies if they properly raised the legal malpractice claim at a fee application hearing.

After the Ninth Circuit ruling, petitioner's former counsel was able to go back to Judge Montali in the bankruptcy court and receive an additional $32,000 for "defending his fees" because the legal malpractice counterclaim had been raised at the fee application hearing so his defense in

the lawsuit was a continuation of the fee dispute.

The financial losses in petitioner's case have been devastating. Petitioner has represented herself pro se in large part because of lack of funds to pay an attorney. Petitioner has a sense of deep depression because of these events and is hoping this court can help other debtors who have found themselves in this position.

FILED
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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: SUSANNA SHAW, Debtor.	No. 01-15143 D.C. No. CV-00-02820-CRB
SUSANNA SHAW, Appelant, v. DAVID REPLOGLE, Appelee.	MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Submitted December 17, 2001**

Before: SCHROEDER, Chief Judge, TROTT and PAEZ, Circuit Judges.

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* This Disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanomously finds this case suitable for decision without oral argument and denies Shaw's request for oral argument. See Fed. R. App. P. 34(a)(2).

Susanna Shaw appeals pro se the district court's order affirming a bankruptcy court's summary judgment dismissal of her adversary action alleging that her former counsel had been negligent and commited legal malpractice in the confirmation of her Chapter 11 case. We have jurisdiction pursuant to 28 U.S.C. § 158(d), and we affirm.

We independently review the bankruptcy court's decision without deference to the district court. *Levin v. Maya Constr. (In re Maya Constr. Co)*, 78 F.3d 1395, 1398 (9th Cir. 1996). We review de novo the bankruptcy court's dismissal on res judicata grounds, *see Siegel v. Fed. Home Loan Mortgage Corp.*, 143 F.3d 525, 528 (9th Cir. 1998), and may affirm on any basis fairly supported by the record, *see Schneider v. Vennard (In re Apple Computer Sec. Litig.)*, 886 F.2d 1109, 1112 (9th Cir. 1989).

Because Shaw's adversary proceeding for professional malpractice involved the same issues she raised in opposition to her former counsel's application for legal fees, and the bankruptcy court actually decided those issues against her, Shaw's adversary proceeding was barred by issue preclusion. *See Durkin v. Shea & Gould*, 92 F.3d 1510, 1515 (9th Cir. 1996) (explaining that issue preclusion bars the relitigation of issues actually litigated and necessarily determined by a court.

We have considered Shaw's remaining contentions and conclude that they lack merit.

Because this case does not present exceptional circumstances, we deny Shaw's request for appointment of counsel on appeal. *See Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE SUSANNA SHAW,
Debtor.
SUSANNA SHAW,
Plaintiff,
v.

DAVID REPLOGLE and THE LAW OFFICES OF DAVID REPLOGLE, a Professional Corporation,
Defendants.

No. C 00-2820 CRB

USBC Nos. 98-3-1299-DM
99-3-0401-TC

ORDER AFFIRMING THE BANKRUPTCY COURT'S ORDER GRANTING SUMMARY JUDGMENT

Now before the Court is the plaintiff's appeal of a U.S. Bankruptcy Court order granting summary judgment to the defendants on the grounds that the plaintiff's suit is barred by res judicata. After carefully considering the parties' papers and the voluminous record, the Bankruptcy Court's order is hereby AFFIRMED.

BACKGROUND

In the process of filing for bankruptcy, the debtor Susanna Shaw ("Shaw" or "the Appellant") filed an action against the defendants David Replogle and his law firm The Law Offices of David Replogle (collectively, "Replogle" or "the Appellees") alleging professional negligence in Replogle's handling of Shaw's bankruptcy. After a series of proceedings in the U.S. Bankruptcy Court for the Northern District of California and the U.S. District Court for Northern District, and even an appeal to the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, Shaw has asked this Court to review several of the orders issued during the course of her bankruptcy litigation, including an order by U.S. Bankruptcy Judge Thomas E Carlson that

granted summary judgment to Replogle.

The events leading to the litigation between these parties began in February 1997 when Shaw was sued by a former tenant for wrongful eviction. That suit eventually settled before trial in February 1998. At least partly as a result of the settlement, Shaw filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code on March 29, 1998. The Bankruptcy Court appointed Replogle to represent Shaw in that case and scheduled the confirmation proceeding for Shaw's bankruptcy plan for December 14, 1998, with a status conference on October 2, 1998.

As part of Replogle's preparation for the confirmation proceeding and the status conference, he negotiated with some of Shaw's creditors in an effort to obtain their consent to the confirmation of her bankruptcy plan, thereby minimizing the time and expense Shaw would incur during the bankruptcy process. One of Shaw's secured creditors, World Saving & Loan ("World Savings"), insisted that Shaw reach an agreement regarding a payment schedule with Carolyn Gold ("Gold"), the attorney for the tenant who had settled with Shaw. World Savings did not want to wait until the December 14 confirmation proceeding to obtain that agreement, so on September 8, 1998, World Savings informed Replogle that Shaw had ten days to reach an agreement with Gold. Otherwise, World Savings indicated, it would contest the confirmation of Shaw's bankruptcy plan.

On Friday, September 25, 1998, despite the expiration of World Savings' ten-day deadline, Replogle learned that World Savings had not yet withdrawn its support for Shaw's bankruptcy plan, and he informed Shaw accordingly. However, Replogle advised Shaw that she had to reach an agreement with Gold immediately or face the possibility that World Savings would contest the confirmation. Shaw asserts that on Monday, September 28, 1998, she instructed Replogle to inform, Gold that Shaw agreed to Gold's terms, including that Shaw pay the settlement within five years and that her payment be secured by a piece of Shaw's property. Shaw claims that Replogle then failed to

inform either Gold or World Savings that Shaw had accepted Gold's terms.

Replogle contends that he did contact Gold to let her know that Shaw had agreed to Gold's terms. The record contains a letter from Replogle to Gold dated September 30, 1996 (but apparently intended to be dated September 30, 1998) indicating that Shaw authorized Replogle to accept Gold's demands regarding the payment of the tenant's settlement. See Shaw R. Appeal, Sept. 29, 2000, Ex. C. In Gold's deposition, she indicated that she had moved to a new law firm on Monday, September 28, and she speculated that the letter may have been sent to her old office in error. See Shaw R. Appeal, Ex. G, at 20 (containing the July 18, 2000 deposition of Carolyn Gold).

On Friday, October 2, 1998, the parties held a status conference in which both Gold and World Savings indicated that they would contest the confirmation of Shaw's bankruptcy plan and that they wanted Shaw's bankruptcy converted to Chapter 7 due to Shaw's failure to reach a final settlement with Gold. In Shaw's view, Replogle's failure to execute an agreement with Gold during the week before the October 2 status conference led to Shaw's contested confirmation and cost Shaw thousands of additional dollars in legal and other expenses. Shaw has also alleged that Replogle fabricated the letter to Gold to conceal his failure to secure an uncontested confirmation, and she has noted that no evidence indicates that Gold actually received the letter.

On February 9, 1999, the Bankruptcy Court confirmed Shaw's bankruptcy plan. After the confirmation, Replogle filed a series of applications pursuant to Shaw's bankruptcy plan seeking compensation for the services he had rendered to Shaw in the course of her bankruptcy. On July 12, 1999, Replogle filed a third interim application for compensation. Shaw submitted a written opposition to Replogle's application, asserting that his failure to secure an agreement with Gold and World Savings during the week preceding the October 2, 1998 status conference was responsible for the high cost of her bankruptcy. See Replogle R

Appeal, Oct. 20, 2000, Ex. 4C, at RA 72-74 (containing Shaw's allegations of malpractice). Shaw repeated her allegations of malpractice at the hearing on Replogle's fee application. See Replogle R. Appeal, Ex. 4H, at RA 148-50.

On September 2, 1999, in spite of Shaw's contention--both in her written papers and at oral argument--that Replogle had committed malpractice, the Bankruptcy Court awarded Replogle over $15,000 in attorney's fees. In the order awarding fees, U.S. Bankruptcy Judge Dennis Montali wrote:

> [T]he court is left with the distinct impression that Shaw has brought virtually all of her problems upon herself and cannot now blame her attorney. The evidence is unmistakable that it was Shaw who delayed reaching an agreement with World Savings because of her desire to negotiate more fully with Ms. Gold. The correspondence [set forth in the supporting papers] makes it clear that Shaw wanted more time to negotiate with Ms. Gold, and thus knowingly took the risk that the deadline imposed upon her by counsel for World Savings might be missed.

Replogle R Appeal, Ex. 4F (containing Bankruptcy Judge Montali's Order), RA 132-33. The court placed particular significance on letters that Shaw had written to Replogle asking him to persuade counsel for World Savings to give Shaw more time--beyond the October 2, 1998 status conference--to negotiate with Gold. See id. at RA 133; Replogle R. Appeal, Ex. 4D (containing Replogle's moving papers and supporting exhibits), at RA 97, 100-01 (containing letters from Shaw to Replogle asking for more time to negotiate with Gold). "In summary," the court concluded, "Shaw cannot pass her problems on to her attorney and complain after the fact about the consequences of her own decisions." Replogle R. Appeal, Ex. 4F, at RA 135. Bankruptcy Judge Montali determined that Replogle was entitled to most of the fees he sought despite Shaw's allegations of malpractice, although the court required Replogle to submit an explanation for part of the amount he sought. On October 7, 1999, the court issued a final order granting payment.

On October 5, 1999, before Bankruptcy Judge Montali's final order, Shaw appealed his interim award of fees to Replogle by filing a statement of election to be heard in federal district court. On March 8, 2000, U.S. District Judge Claudia Wilken granted Replogle's motion to dismiss Shaw's appeal for lack of jurisdiction, finding that Shaw's appeal of Bankruptcy Judge Montali's September 2 order was untimely.

Meanwhile, on October I, 1999, Shaw had filed a complaint against Replogle in San Francisco County Superior Court alleging legal malpractice on the same factual basis as her objection to Replogle's application for fees. On November 1, 1999, Replogle removed Shaw's case to the Bankruptcy Court. Shaw moved to remand the case back to state court in February 2000, but that motion was denied in March 2000. Shaw appealed that denial to the Bankruptcy Appellate Panel. On August 9, 2000, the Bankruptcy Appellate Panel dismissed her appeal on jurisdictional grounds.

On June 30, 2000, Replogle filed a motion for summary judgment in Bankruptcy Court asserting that Shaw's legal malpractice claim was precluded by res judicata since Shaw had already litigated her claim in objecting to Replogle's fees. On July 28, 2000, Bankruptcy Judge Carlson held a hearing on the motion and granted the defendants' motion for summary judgment. In the hearing, Shaw once again presented her argument that Replogle had committed legal malpractice in failing to secure a final agreement with Gold that would have prevented Gold and World Savings from contesting the confirmation of Shaw's bankruptcy plan. See Transcript of Hearing on Defendants' Motion for Summary Judgment, July 28, 2000, at 4 (containing Shaw's assertion that she did not have a full and fair opportunity to litigate her malpractice claim).

Bankruptcy Judge Carlson rejected Shaw's argument. He concluded that Shaw's malpractice suit involved the same issues as Replogle's application for attorney's fees, that Shaw had a full and fair opportunity to challenge Replogle's fees, and that the parties actually litigated the

issue of whether Replogle was negligent. See id. at 5-6 (noting that Shaw could and did raise Replogle's malpractice as a defense to his request for fees). The court also pointed to Epstein v. Visher, 1997 WL 231108 (N-D. Cal.), in which U.S. District Judge D. Lowell Jensen concluded that challenges to the quality of a bankruptcy attorney's representation may be precluded by res judicata when the issue was already raised in an objection to the attorney's fees. See id. at 7.

On September 22, 2000, Shaw filed an appeal from Bankruptcy Judge Carlson's order granting summary judgment with this Court. Shaw has also challenged other orders by Bankruptcy Judge Carlson striking her demand for a jury trial and denying her motion to remand her case to state court. Replogle filed an opposition to Shaw's motion on October 20, 2000, and Shaw filed a response on October 30, 2000.

DISCUSSION

Despite this long and somewhat complicated procedural history, then, Shaw's appeal of Bankruptcy Judge Carlson's order granting summary judgment to Replogle presents a fairly straightforward question: namely, is Shaw's legal malpractice claim against Replogle precluded on the grounds of res judicata by Bankruptcy Judge Montali's award of fees to Replogle? This Court reviews the legal conclusions of the Bankruptcy Court de novo, but reviews a Bankruptcy Judge's factual determinations for clear error. See Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000) (noting that "findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo"). After outlining the standards for summary judgment and res judicata, the Court will examine whether Shaw's state court malpractice action is precluded by Bankruptcy Judge Montali's award of fees to Replogle.

I. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A fact is "material" if the fact may affect the outcome of the case. See id. at 248. "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997). A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. See Celotex Corp. v Cattrett, 47 U.S. 317, 323-24 (1986).

The party moving for summary judgment bears the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. See id. at 323. Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. See id. Once the moving party meets this initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial." Fed. R Civ. P. 56(e). The non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting Richards v. Combined Ins. Co., 55 F.3d 247, 251 (7th Cir. 1995)). If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. See Celotex 477 U.S. at 323.

II. STANDARD FOR RES JUDICATA

A later claim is precluded by res judicata if in an earlier adjudication a court of competent jurisdiction (1) issued a final judgment on the merits (2) involving the same "claim" as the earlier suit and (3) involving the same parties or their privies. See Nordhorn v. Ladish Co., Inc., 9 F.3d 1402, 1404 (9th Cit. 1993). Whether two claims are the same

for res judicata purposes depends on four criteria:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Id. at 1405 (quoting Costantini v. Trans World Airline, 681 F.2d 1199, 1201-02 (9th Cir. 1982)).

III. ATTORNEY'S FEES IN BANKRUPTCY PRO CEEDINGS: WHETHER SHAW'S MALPRACTICE SUIT IS PRECLUDED BY RES JUDICATA

The Court must apply the res judicata standard outlined in Nordhorn to determine whether Shaw is precluded from bringing her malpractice action against Replogle in light of Bankruptcy Judge Montali's award of fees. The Bankruptcy Court was a court of competent jurisdiction, and Bankruptcy Judge Montali's order on October 7, 1999 constituted final judgment on the merits of Replogle's fees. See Replogle R. Appeal, Ex. 41 (containing District Judge Wilken's order dismissing Shaw's appeal of the September 2 order), RA 180 (noting that the September 2 order was not a final order but concluding that the October 7 order was final); In re Yermakov, 718 F.2d 1465, 1469 (9th Cir. 1983) (holding that an order for an interim allowance of fees can constitute a final judgment where the attorneys for the debtors have been discharged from further representation). Moreover, there is no question that Shaw's malpractice suit involves the same parties.

The only remaining issue is whether Shaw's assertion that Replogle committed malpractice is the same claim that she made in objecting to Replogle's fees. If Shaw was free to raise Replogle's alleged malpractice as a defense at the hearing regarding his fees, Shaw's state court malpractice suit is barred by res judicata. Ultimately, based on the attorney's fees provisions in the Bankruptcy Code, the Nordhorn factors, and District Judge Jensen's decision in Eptsein, this Court concludes that Shaw's state court action

is precluded by res judicata, and in fact would even be precluded by collateral estoppel.

The Bankruptcy Code permits an attorney representing a debtor to receive payment for her fees from the debtor's estate. Section 330 of the Code vests a court with broad discretion to consider "all relevant factors" in awarding an attorney reasonable compensation for actual, necessary services rendered to the debtor. 11 U.S.C. § 330(a)(3) (West 2000) (instructing a court to consider "the nature, the extent, and the value of such services" and whether the services were "beneficial at the time at which the service was rendered"). Section 331 permits an attorney to apply for interim compensation in accordance with section 330. See 11 U.S.C. § 331. Moreover, under certain circumstances, section 329 requires an attorney representing a debtor to file with the court a statement of the compensation that she was paid. See 11 U.S.C. § 329(a). A court may reduce the compensation that the attorney received if the fees exceed "the reasonable value of any such services." 1 I U.S.C. § 329(b).

Courts awarding attorney's fees under those sections regularly consider the quality of the services rendered by a bankruptcy attorney, including whether the attorney was negligent or committed malpractice. See, e.g., In re Frazier, 231 B.R. 454, 457-58 (Bankr. D. Corm. 1999) (outlining the twelve-factor test for determining whether an attorney's fee is reasonable established in Johnson v. Georgia Highway Express Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)); id. at 458 (noting that "[b]ankruptcy courts exercise broad discretion in determining the reasonableness of attorneys' fees"); In re W.J. Servs., Inc., 139 B.R. 824, 827-28 (Bankr. S.D. Tex. 1992) ("The authorities agree that misconduct of counsel constitutes a sufficient reason for denying any and all attorney's fees to applicant counsel.") disapproved of on other grounds, Matter of Walker, 51 F.3d 562, 570-71 (5th Cir. 1995); id ("Courts have repeatedly used fee denial as the most effective weapon against malpractice." Matter of Dalton, 95 B.R. 857, 860 (Bankr. M.D. Ga. 1989) (holding that counsel for debtor was not entitled to attorney's fees

where his services failed to meet minimum acceptable standards); Matter of Chin, 47 B.R 894, 897 (S.D.N.Y. 1984) (affirming a bankruptcy judge's order remitting an attorney's fees upon a finding that the attorney was negligent in representing the debtor); In re Damon, 40 B.R 367, 376 (Bankr. S.D.N.Y. 1984) (holding that an attorney forfeits all bankruptcy fees if the attorney violates ethical standards or his fiduciary duties to his client); In re Richardson, 14 B.R. 755, 757 (Bankr. E.D. Pa. 1981) (holding that where an attorney's services were so poorly and negligently performed as to be of no value to the debtor, the attorney was not entitled to retain any funds received); Matter of Wilson, 11 B.R. 986, 991 (Bankr. S.D.N.Y. 1981) (holding that an attorney's fees should be returned to the estate where the representation was incompetent). Thus, Shaw was free to (and did) raise her malpractice claim before Bankruptcy Judge Montali in objecting to Replogle's application for fees, and the court properly considered her claim in deciding to award fees to Replogle in spite of her malpractice allegations.

The four factors in Nordhorn also suggest that Shaw's suit is precluded by res judicata. Replogle's rights to his fees would be impaired by permitting Shaw to prosecute her malpractice claim. The evidence presented in Shaw's current malpractice action would be substantially similar if not identical to the evidence presented to Bankruptcy Judge Montali in the fee application proceeding. Moreover, the two suits--Shaw's current negligence suit and the fee application hearing--involve the infringement of the same right: Shaw's right to competent representation by Replogle. Finally, the two suits arise out of the same transactional nucleus of facts.

In Epstein v. Visher, District Judge Jensen reached the same conclusion. The case was nearly identical to the present dispute, with a debtor who objected to a Bankruptcy Court's award of attorney's fees and who later filed a malpractice action against the attorney See Epstein, 1997 WL 231108, at * 1. Citing the same provisions of the Bankruptcy Code under which Replogle sought attorney's fees, District Judge Jensen concluded that the debtors could

have brought their malpractice claim at the time of the fee application proceeding. See id. at *4-5 (citing 11 U.S.C. § 330 and holding that the debtors' malpractice claim arose out of the same nucleus of operative facts). Because the debtors had failed to raise the malpractice issue at that hearing, District Judge Jensen found, they were barred from relitigating their malpractice claim. See id. at *5 ("For purposes of res judicata, it is immaterial whether or not the issue of [the attorney's] competence was actually litigated."); id. ("Accordingly, the Court finds that the plaintiffs should have litigated their malpractice claim at the time of the previous attorney's fee proceeding, which proceeding resulted in a final judgment.").

Indeed, even if this Court were to apply the stricter standard under collateral estoppel, Bankruptcy Judge Montali's fee orders would still preclude Shaw's malpractice claim. To establish that Shaw is collaterally estopped from pursuing her malpractice claim, Replogle would have to show that: (1) Shaw's current malpractice claim is identical to the one adjudicated in the prior litigation; (2) the malpractice claim was actually litigated by Shaw; and (3) the determination of whether Replogle committed malpractice in the prior litigation was a critical and necessary part of Bankruptcy Judge Montali's judgment. See Trevino v. Gates, 99 F.3d 911, 923 (9th Cir. 1996) (containing the standard for collateral estoppel).

Replogle would be able to establish the elements of collateral estoppel because Shaw's current malpractice action is identical to the objections she actually raised at the fee application proceeding and the issue of Replogle's negligence was a critical and necessary part of Bankruptcy Judge Montali's order. Unlike the debtors in Epstein, who failed to explicitly raise their malpractice allegations at the fee application proceeding, here Shaw actually presented her malpractice claim to Bankruptcy Judge Montali in objecting to Replogle's fees. Thus, Shaw's professional negligence claim would also be precluded by collateral estoppel.

The Court observes that it is not its place on this appeal--nor was it the task of Bankruptcy Judge Carlson in

granting summary judgment--to second-guess Bankruptcy Judge Montali's factual determination that Shaw's malpractice claim had no merit (other than perhaps to review his factual findings for clear error). If this Court (or Bankruptcy Judge Carlson) had been presented with Shaw's claim in the first instance, it may well have reached a different result. After all, Shaw's allegations--if true--raise serious concerns about the quality of Replogle's representation. As a matter of first impression, this Court would not be able to grant summary judgment to Replogle, because there would be a genuine issue of material fact as to whether Replogle properly contacted the attorneys for Shaw's creditors in late September and early October 1998.

However, Shaw has already had her bite at the apple. Because she was able to (and did) assert her malpractice claim as a defense to Replogle's application for fees, and because the Bankruptcy Court actually considered her claim in reaching a judgment that became final, Shaw has already had a full and fair opportunity to litigate her claim. As a result, Shaw's current state court malpractice suit is barred by both res judicata and collateral estoppel. Accordingly, there is no genuine issue of material fact precluding summary judgment. Bankruptcy Judge Carlson was correct in issuing his order granting summary judgment to Replogle, and that order must be AFFIRMED.

Shaw also indirectly appeals Bankruptcy Judge Carlson's orders denying her motion to remand and granting Replogle's motion to strike Shaw's demand for a jury trial. This Court's determination that Shaw's state court action is precluded by either res judicata or collateral estoppel is dispositive of those issues. Even if this Court could consider those appeals (which is by no means clear), the outcomes of those orders would not alter the preclusive effect of Bankruptcy Judge Montali's order. See also Billing v. Ravin, Greenberg & Zackin P.A., 22 F.3d 1242, 1253 (3d Cir. 1994) (holding that where a debtor objecting to an award of attorney's fees claims that her bankruptcy attorney committed malpractice, neither the attorney nor the debtor is entitled to a jury trial on the malpractice issue).

CONCLUSION

For the foregoing reasons, Shaw's appeal from Bankruptcy Judge Carlson's order granting summary judgment to Replogle must fail. Bankruptcy Judge Carlson's order is therefore AFFIRMED, and Shaw's appeal is dismissed, with each side to bear its own costs.

IT IS SO ORDERED.

Dated: 12-22-00

"S/CHARLES R. BREYER"
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

NOTICE: THIS IS AN UNPUBLISHED OPINION.

United States Court of Appeals. Ninth Circuit.
In Re: Joan Sylvia **EPSTEIN** and William L. **Epstein,** M.D., Debtors.
Joan Sylvia **EPSTEIN;** William L. **Epstein,** M.D., Appellants,
v.
Christopher N. **VISHER,** Appellee,

No. 97-15893.
D.C. No. CV-95-04167-DLJ.

Argued and Submitted June 12. 1998.
Decided July 7, 1998.

Appeal from the United States District Court for the Northern District of California D. Lowell Jensen, District Judge, Presiding.

Before HALL and THOMAS, Circuit Judges, and MOSKOWITZ, [FN2] District Judge.

FN2. Honorable Barry Ted Moskowitz, United States District .lodge for Southern California, sitting by designation.

MEMORANDUM [FN-1]

FN1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**1 Joan and William Epstein appeal the district court's entry of summary judgment, which dismissed all claims against the Epsteins' bankruptcy attorney, Christopher Visher. After careful consideration of the briefs, the record and oral argument by counsel, we affirm the district court. Because the parties are well familiar with the factual and

procedural history of this else, we will not recount it here.

The negligence claim regarding the Pacifica property is barred by issue preclusion. [FN3] "[I]ssue preclusion prevents relitigation of all issues of fact or law that were actually litigated and necessarily decided in a prior proceeding." Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir.1988). In order to apply issue preclusion, the issue being precluded must have been "actually decided" after a "full and fair opportunity" for litigation. Id. The Epsteins' full and fair opportunity to present issues regarding the Pacifica property appraisal to the bankruptcy court is demonstrated by their own objections to Visher's application for fees. In the Epstein's objections to Visher's application for fees, the Epsteins complained that "no appraisal was apparently offered by Mr. Visher" and that Visher's work oil the Pacifica property rendered no benefit to the estate. The value of Visher's work on the Pacifica property was clearly before the bankruptcy court, and therefore Visher's competence in this regard was actually decided. Consequently, any new determination regarding Visher's performance on the Pacifica property is barred by issue preclusion.

> FN3. Although the district court may have determined that this claim was barred by the doctrine of claim preclusion, this Court may affirm on any ground supported by the record. United States v, Washington, 969 F.2d 752. 755 (9th Cir.1992).

The Epsteins' negligence claim regarding their proposed § 1031 exchange was properly dismissed by the district court because the proposed exchange would not, as a matter of law, qualify for preferential tax treatment- 26 U.S.C. § 1031 provides that "[n]o gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment." The Supreme Court has specifically held that an exchange

of "a transfer of future income from oil leases for real estate" does not qualify as a "likekind" exchange. See Commissioner v. P.G. Lake, Inc., 356 U.S. 260, 268, 78 S.Ct. 691, 2 L.Ed.2d 743 (1958). Although the Epsteins contend that the § 1031 tax exchange may have succeeded if brought before the court because the leasehold interest was for more than 30 years and therefore qualified as a like-kind exchange, Joan Epstein's own declaration indicates that the exchange was not for a lease of real property for thirty years. Rather, it was a lease of real property for 10 years, coupled with an oil-lease for twenty years. Thus, it would appear that the Epsteins' proposed transaction would not qualify for preferential tax treatment under 26 U.S.C. § 1031. Consequently, Visher's failure to present the transaction to the bankruptcy court cannot, as a matter of law, constitute negligence.

**2 Finally, the district court properly entered summery judgment against the Epsteins on their professional malpractice claim regarding Visher's failure to tilt his security interest in New York. A professional malpractice claim depends upon the existence of a dory. Goldberg v. Frye, 217 Cal.App.3d 1258, 266 Cal.Rptr. 483, 488 (Ct.App.1990). "Absent duty there can be no breach and no negligence." Id. An attorney's fiduciary dory to a client is dependent upon the existence of an attorney-client relationship. Nichols v. Keller, 15 Cal.App.4th 1672, 19 Cal.Rptr.2d 601, 608 (CtApp.1993). Although parties may be involved in a fiduciary relationship, certain aspects of that fiduciary relationship may be adversarial. See, e.g.. Van de Kamp v. Bank of America, 204 Cal .App.3d 819, 251 Cal.Rptr. 530 (Ct.App,1988). Here, the Epsteins hired independent counsel to contest Visher's fees and negotiate arrangements for payment of those fens. Clearly, Visher was acting in his capacity as a creditor in the context of the fee arrangement. Although Visher may have had an ongoing duty to implement the plan and protect the estate, he had an adversarial role in the determination and security of his fees. Thus, he had no duty to protect the Epsteins' rights regarding the

security agreement. Because Visher had no duty to file the security interest his failure to do so cannot, us a matter of law, constitute professional malpractice.

AFFIRMED

United States Court of Appeals.
First Circuit.

In re: Peter P. IANNOCHINO, Paula \I. Iannochino, Debtors
Peter P. Iannochino, et al., Plaintiffs. Appellants.
v.
Stephan M. Rodolakis; Carl D. Aframe. Defendants, Appellees.

No. 00-1222.

Heard Sept. 11, 2000.
Decided March 17, 2001.

Chapter 7 debtors sued their former bankruptcy counsel far his alleged malpractice in representing debtors in bankruptcy case. The United States Bankruptcy Court for the District of Massachusetts granted attorney's motion for summarv judgment based upon res judicata effect of its prior tee award. and debtors appealed. The District Court, Nathaniel M. Gorton. J., affirmed. On further appeal, :he Court of Appeals, Lipez, Circuit Judge, held that sufficient identity existed between debtors' malpractice claims against their bankruptcy attorney and attorney's fee application, such that bankruptcy court's implicit finding as to quality and value of attorney's services, when it awarded fees, served to preclude debtors, under res judicata principles, from pursuing their legal malpractice claims.

Affirmed.

(PORTION OF CITATION RELEVANT TO THIS PETITION)

A. The malpractice counterclaim

[4] As an initial matter, we must address whether the doctrine of res judicata applies to this case. The Iannochinos

argue that res judicata is inappropriate here because they "have never pursued a prior remedy or suit against the defendants [or] engaged in multiple attempts to obtain relief." Though this argument is strikingly undeveloped, it adverts to an important issue. At the time of the fee application, the Iannochinos' malpractice claims were counterclaims and/or defenses to that application. The failure to interpose a counterclaim does not necessarily act as a bar to later actions. *See, e. F., Restatement (Second) of Judgments* § 33111 (1982); *see also Rowland u. Harrison*, 330 Md. 331. 177 A.2d 51, 56 119901 (refusing to find preclusion for failure to raise counterclaim under Maryland's permissive counterclaim rule). This principle protects putative counterclaimants from the inadvertent loss of their claim. Carried too far however, this principle would undermine the protective purpose of res judicata. *See, e.g., Bay State HMO Mgmt., Inc. v. Tingle, Ss- Inc.*, 181 F.3d I74, 181 (1st Cir.1999) ("The policy behind res judicata is to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.") (internal quotations omitted). Consequently, this principle is subject to two important exceptions that narrow it; applicability and reduce the potential waste of judicial resources and cost; to the parties associated with multiply suits bard upon the same facts. *See Restatement (Second) of Judgments* § 22(2) (1982).

[5][6][7] The first of these exceptions applies to compulsory counterclaims. *See id.* § 22(2)(a). But for the bankruptcy setting of this case, the Iannochinos' malpractice counterclaims would be subject to this exception. A fee application in bankruptcy is akin to an action to recover a debt. Under ordinary federal rules of civil procedure, if a counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdic-

tion," the counterclaim is compulsory and must be raised. Fed.R.Civ.P. 13(a). As both the fee application and the malpractice counterclaim concern the same transaction, the counterclaim could have been subject to Rule 13. Moreover, the compulsory counterclaim rule is applicable in certain bankruptcy contexts. Thus, it the fee application had changed from a contested matter to an adversary proceeding, [FN2] the Iannochinos' malpractice counterclaims would also have been compulsory and subject to res judicata. *See* Fed. R. Bankr.7013 (making Fed.R.Civ.P. 13 applicable to adversary proceedings). Alternatively, the bankruptcy court could have ordered Rule 7013 applicable to the fee application, again subjecting the counterclaims to res judicata under this exception. *See* Fed. R. Bankr.P. 9014 (allowing the bankruptcy court "at any stagy in a particular [contested] matter [to] direct that one or in more of the" rules applicable to adversary proceedings apply). Nothing in the record indicates, however, that the for application ever became an adversary proceeding or that the bankruptcy court ever directed that Rule 7013 apply. Therefore, the Iannochinos' malpractice counterclaim to the fee application was not compulsory and cannot by res judicata under this exception.

[8][9] The second exception is applicable when the "relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action could nullify the initial judgement or would impair rights established in the initial action." *Restatement (Second) of Judgments* § 22(2)(b) (1982). In the normal course of civil litigation, the Iannochinos' malpractice counterclaim could not affect a prior judgment assessing fees. *See Rowland*, 577 A.2d at 57 (holding claim for professional malpractice against veterinarian would not nullity prior judgment establishing debt for the allegedly substandard services), In bankruptcy, however, a successful malpractice action could impair rights that Aframe and Rodolakis had gained from the order awarding them fees. Under the relevant section of the bankruptcy code governing fee awards, a finding of mal-

practice would mean that the attorneys were not entitled to compensation for those services found to be substandard. *See* 11 U.S.C. § 330(a)(4) [FN3]; *see also In re Southmark*, 163 F.3d 925, 931 (5th Cir.1999) ("It is evident that a court-appointed professional's dereliction of duty could transgress both explicit Code responsibilities and applicable professional malpractice standards."). Nor does it matter that the fees may already have been awarded by the time of the malpractice judgment. Fed.R.Civ.P. 59 and 60 are applicable in bankruptcy, thus giving bankruptcy courts broad authority to reconsider judgments. *See* Fed. R. Bankr.P. 9023 (Fed.R.Civ.P. 59); Fed. R. Bankr.P. 9023 (Fed.R.Civ.P. 60): *see also* Fed. R. Bankr.P. 3008 (allowing parties in interest to "move for reconsideration of an order allowing or disallowing a claim against the estate"). Furthermore, a bankruptcy court can order professionals to disgorge fees that it had previously awarded them. See 11 U.S.C. § 105(a) ("The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); *In re Hot Tin Roof. Inc.*, 205 B.R. 1000 (1st Cir. Bankr.App. Panel 1997) (upholding disgorgement for failure to disclose conflict of interest); *In re Capgro Leasing Assocs.*, 169 B.R. 305, 317 (Bankr.E.D.N.Y. 1994) (ordering disgorgement of fees because services did not benefit the estate in any way).

The "successful prosecution" of the Iannochino's malpractice claims in the action here has the potential, therefore, to provide the basis for a later order, following a motion to reconsider, forcing Aframe and Rodolakis to disgorge the fees that the bankruptcy court am awarded them. Thus, the second exception in section 22 of the *Restatement* is applicable here. *See Restatement (Second) of Judgments* § 22 Rptr. Notes (1982) (noting that the exception is applicable where "a defendant, having failed to interpose a defense or counterclaim in a prior action which terminated in a judgement for plaintiff, now seeks in a subsequent action to obtain relief which, if granted. mould permit recovery of the amount paid pursuant to that judgment on a restitution the-

ory"). The Iannochinos cannot escape res judicata on the ground that their malpractice claims were only counter-claims to the fee application. [FN4]

*200 F.3d 382, *; 2000 U.S. App. LEXIS 878, **;*
35 Bankr. Ct. Dec. 152

IN THE MATTER OF: INTELOGIC TRACE, INC., DEBTOR; RANDOLPH N. OSHEROW, TRUSTEE, Appellant, versus ERNST & YOUNG, LLP, Appellee.

No. 98-51085

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

200 F.3d 382; 2000 U.S. App. LEXIS 878; 35 Bankr. Ct. Dec. 152

January 25, 2000, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Texas. SA-98-CV-596. Edward C Prado, US District Judge.

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant filed an appeal from a ruling entered in the United States District Court for the Western District of Texas, affirming the ruling of the district court which granted summary judgment to appellee in an action alleging negligence and professional malpractice in a bankruptcy proceeding.

OVERVIEW: Appellant, the bankruptcy trustee of a Chapter 7 debtor, brought suit in state court against appellee, alleging negligence and professional malpractice arising from services appellee performed during the debtor's previous Chapter 11 bankruptcy proceeding. The

case was removed to the bankruptcy court. The bankruptcy court granted summary judgment for appellee, and the district court affirmed. The appellate court also affirmed. The award of professional fees and appellant's malpractice claims concerned the same nucleus of operative facts, and thus met the transactional test. There was an identity of claims between the fee application hearing and the instant malpractice suit. The court believed that the debtor was aware of a real potential for claims against appellee, and that the bankruptcy court had procedural mechanisms that would have allowed the debtor to assert such claims.

OUTCOME: The judgment was affirmed, because appellant's claims against appellee were barred by res judicata.

(PORTION OF CITATION RELEVANT TO THIS PETITION)

Next, we consider whether the bankruptcy procedures afford an opportunity to litigate these claims effectively at the fee hearing. *See Hendrick v. Avent, 891 F.2d 583, 586-87 (5th Cir. 1990); D-1 Enterprises, 864 F.2d at 40* (concluding that *res judicata* does not apply where the claim sought to be barred could not have been effectively litigated in the prior proceeding). The Trustee argues that these malpractice claims are counterclaims that could only be raised in an adversary proceeding, and that because the fee hearing was a contested matter, and not an adversary proceeding, these claims could not have been addressed at the fee hearing. We disagree.

*We begin by recognizing that a fee application hearing is a contested matter in the bankruptcy context; however, the nature of the proceeding does not automatically determine whether this action is barred by *res judicata*. *See In re Howe, 913 F.2d at 1146 n.28.* Although the fee hearing was a contested [**21] matter, Ernst & Young's fee application was a claim against IT. *See 11 U.S.C. § 101*(5). Had IT objected to the fee application and included with its objection a claim

for affirmative relief on account of alleged malpractice, the matter would have become an adversary [*390] proceeding. *See* BANKR. R. 3007. n4 *In fact, the rule "provides no time limit for filing objections to claims," and the Trustee does not claim that the reorganization plan or the bankruptcy court imposed one. 9 LAWRENCE P. KING, COLLIER ON BANKRUPTCY P 3007.01[5], at 3007-7 (15th ed. 1983). *Furthermore, Bankruptcy Rule 9014, which governs contested matters, provides that "the court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." BANKR. R. 9014; *see also* 10 LAWRENCE P. KING, COLLIER ON BANKRUPTCY P 7000, at 7000-1 (15th ed. 1983) ("Rule 9014 itself provides that certain of the rules in Part VII apply to contested matters and the court may direct that one or more other Part VII rules also shall apply."). Part VIPs rules are comparable to the Federal Rules of Civil Procedure. *See id.* at P 7000, at 7000-2. Under Part VII, the [**22] bankruptcy court is to apply the Federal Rules of Civil Procedure governing discovery in adversary proceedings. *See* BANKR. R. 7026-37. Thus, even if IT had only informed the bankruptcy court of its concerns and not immediately sought affirmative relief for malpractice, the bankruptcy court could have stayed the fee hearing and permitted time for discovery and development under the procedures available in Part VII of the Bankruptcy Rules.

Supreme Court, U.S.
FILED
SEP 20 2002
CLERK

No. 02-265

IN THE

Supreme Court of the United States

SUSANNA SHAW,

Petitioner,

v.

DAVID REPLOGLE AND THE LAW OFFICES OF DAVID REPLOGLE, A PROFESSIONAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The sole issue presented by the Petition is whether the Court of Appeals for the Ninth Circuit erred in affirming the order of the District Court which affirmed the Bankruptcy Court's order granting summary judgment in favor of Respondents on the ground that Petitioner Susanna Shaw was estopped by the doctrine of *res judicata* from maintaining an action for professional negligence where the identical issue was litigated in the underlying bankruptcy proceeding.

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11 U.S.C. § 330 4

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Sup. Ct. R. 10 6

STATEMENT OF THE CASE

The Court of Appeals for the Ninth Circuit and the District Court for the Northern District of California accurately set forth the pertinent facts related to Shaw's claims. Pet. at pages 8, 9-14.

Briefly stated, this case involved an action for professional negligence filed by Shaw against Respondents, her former legal counsel. Respondents had represented Shaw in her Chapter 11 reorganization case before the United States Bankruptcy Court for the Northern District of California. David Replogle and the Law Offices of David Replogle, a Professional Corporation (the Respondents), filed a fee application with the Bankruptcy Court. Shaw vigorously opposed that fee application, alleging that Respondents had been negligent in their representation of her. After the matter was fully briefed and heard, the Bankruptcy Court overruled Shaw's objections specifically finding that Shaw was the author of her own difficulties.

Shaw, dissatisfied with the Bankruptcy Court's order awarding fees to Respondents, then filed an action for professional negligence against Respondents. The negligence action was removed to the Bankruptcy Court. Thereafter, the Bankruptcy Court granted Respondents' motion for summary judgment, finding that Shaw was estopped from relitigating the same issue a second time.

Shaw appealed the order of the Bankruptcy Court granting summary judgment to the United States District Court for the Northern District of California. The District Court entered its Order Affirming the Bankruptcy Court's Order Granting Summary Judgment. Pet. at pages 9-21.

Shaw appealed the order of the District Court affirming the Bankruptcy Court's order granting summary judgment to the Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the District Court's order affirming the Bankruptcy Court's order granting summary judgment. Pet. at pages 7-8.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS DID NOT ERR IN DECIDING THE CASE

The District Court held that Shaw was barred by both collateral estoppel and *res judicata* from relitigating her claim of professional negligence against Respondents.

Where a claim between the same parties has been litigated, resulting in a final adjudication, the losing party cannot relitigate the same issue. *Blonder-Tongue Laboratories v. Univ. of Ill. Found.*, 402 U.S. 313, 323-24, 91 S. Ct. 1434, 1440-41 (1971); *United States v. Utah Const. & Mining Co.*, 384 U.S. 394, 422, 86 S. Ct. 1545, 1560 (1966) and *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1404 (9th Cir. 1993).

According to *Nordhorn v. Ladish Co., Inc., Id.*, *res judicata* precludes the prosecution of a later claim if an earlier adjudication by a court of competent jurisdiction issued a final judgment on the merits involving the same "claim" as the earlier suit involving the same parties or their privies. *Id.* at 1404. Whether two claims are the same for *res judicata* purposes depends on four criteria:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Id. at 1404.

The District Court applied the standards outlined in *Nordhorn v. Ladish Co., Inc.* to Shaw's claim and found that Shaw was precluded from bringing her negligence action by both collateral estoppel and *res judicata*. According to the District Court,

> Shaw has already had her bite at the apple. Because she was able to (and did) assert her malpractice claim as a defense to Replogle's application for fees, and because the Bankruptcy Court actually considered her claim in reaching a judgment that became final, Shaw has already had a full and fair opportunity to litigate her claim. As a result, Shaw's current state court malpractice suit is barred by both res judicata and collateral estoppel.

Pet. at pate 20.

The District Court properly applied the standards outlined in *Nordhorn* in affirming the order of the Bankruptcy Court. The Court of Appeals further properly applied those principles in affirming the District Court's decision.

According to the Court of Appeals, Shaw's negligence action was barred by issue preclusion since it raised the same issues Shaw raised in her opposition to the fee application. Pet. at page 8.

II.

THE LOWER COURTS' RULINGS DO NOT CONFLICT WITH DECISIONS FROM OTHER JURISDICTIONS

The rulings below are fully consistent with those from other jurisdictions.

Because the quality of counsel's services are inextricably connected to the court's determination of counsel's fees under Section 330 of the Bankruptcy Code, two court's have recently held that even the failure to raise the issue of malpractice as a defense to counsel's fee application nonetheless acts as a bar to a subsequent negligence action.

For example, in *Osherow v. Ernst & Young, LLP (In re Interlogic Trace, Inc.)*, 200 F.3d 382 (5th Cir. 2000), the court held that "the award of professional fees and the Trustee's malpractice claims concern 'the same nucleus of operative facts' and meet the transactional test." *Id.* at 388. The court then applied *res judicata* to preclude the second action for negligence even though the malpractice claim was not asserted as a defense to the requested fees.

The First Circuit reached the same conclusion in the recent case of *Iannochino v. Rodolakis*, 242 F.3d 36 (1st Cir. 2001). In that case, the Chapter 7 debtors brought a negligence action against their former counsel. Although the

Debtors did not explicitly raise the issue of malpractice at the time of the fee application hearing, the court nonetheless found that *res judicata* barred the second action for malpractice.

Respondents are not aware of any reported Ninth Circuit case addressing the specific issue of the *res judicata* effect of fee application orders.[1] However, the Ninth Circuit found, in similar circumstances, that where an earlier determination could not have been issued without a determination of the issue sought to be litigated in the second action, the first action was, in fact, determinative of that issue. In the recent decision of *Baldwin v. Kilpatrick (In re Baldwin)* 249 F.3d 912 (9th Cir. 2001), the court found that the state court could not have issued a judgment on an intentional tort without the finding of wilful conduct. To issue a judgment on an intentional tort required that there be a finding that there had, in fact, been an intentional act. Accordingly, the issue of "wilfulness" had already been determined by the state court and the judgment of the state court was determinative of that issue.

In this case, as the District Court noted, Shaw already had her bite at the apple. Shaw vigorously asserted her malpractice claim as a defense to the fee application. She had a full and fair opportunity to litigate her claims. The Bankruptcy Court actually heard and determined Shaw's

1. Although Respondents are not aware of any reported Ninth Circuit case directly on point, in 1997, Judge D. Lowell Jensen, United States District Judge for the Northern District of California, reached the same conclusion as the Fifth and First Circuit Courts cited herein. A copy of Judge Jensen's decision in *Epstein v. Visher*, 1997 U.S. Dist. LEXIS (N.D. Cal., March 28, 1997) is attached to the Petition at pages 23-26.

claims. Issue preclusion bars the relitigating of issues actually litigated and necessarily determined by a court. *Durkin v. Shea & Gould*, 92 F.3d 1510, 1515 (9th Cir. 1996).

The rulings of the lower courts in this case are fully consistent with those of the First and Fifth Circuits. Both the First and Fifth Circuits held that a subsequent malpractice action is barred even when the issue was not actually raised in connection with the fee application. Here, Shaw actually raised and litigated the issue in opposing the fee application. The lower courts' decisions are, therefore, fully consistent with those from other jurisdictions that have decided the issue.

III.

SHAW HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

"Review on a writ of certiorari in not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Shaw has not presented any compelling reason for this Court to exercise discretionary jurisdiction over her appeal of the grant of summary judgment.

After considering the entire record and the applicable law, the District Court properly held that Petitioner's malpractice action was barred by collateral estoppel and *res judicata*. The Court of Appeals affirmed that decision. This case is not, as Petitioner suggests, an aberration that will adversely affect individuals who seek Bankruptcy

protection. Rather, it is the proper application of one of the most basic principles of jurisprudence. This case raises no significant issue that warrants this Court's review.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION

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REASONS WHY WRIT SHOULD BE HEARD

I.

INFORMATION PROVIDED IN RULINGS FROM OTHER JURISDICTIONS CONFLICT WITH THIS DECISION BY THE NINTH CIRCUIT

Respondent is not understanding the area where decisions of the First and Fifth Circuit courts are in conflict with the controlling decision of the Ninth Circuit court on the same important matter, involving decisions in bankruptcy which are not subject to res judicata.

Petitioner is not disputing the fact that both the Fifth Circuit in *Interlogic-Trace v. Ernst & Young, 200 F.3d* (5th Cir. 2000) and the First Circuit in *Iannochino v. Rodolakis*, 242 F.3d 36 (1st cir. 2001) came to the same conclusion as the Ninth Circuit in *Epstein v. Visher,* 1997 U.S. Dist. Lexis (N.D. Cal., March 28, 1997), that the debtors should have raised their legal malpractice claims at the attorney's fee application hearings and were therefore barred by res judicata from pursuing the claim later.

However the First and Fifth Circuit rulings did address the issue of what would have happened if the debtors had raised the malpractice counterclaim at the fee application hearing, which petitioner did, both in the written objection and again at the hearing.

The Fifth Circuit addressed the issue at greater length in its discussion of exceptions in bankruptcy to decisions which are subject to res judicata. Once the malpractice counterclaim is

raised at the fee application hearing, the court would have to order that rule 7013 of the Federal Rules of Bankruptcy Procedure be applied to the fee application matter in order to subject the claim to res judicata. A bankruptcy judge is allowed at any time to convert a procedure into an adversarial proceeding.

A debtor's damages from an attorney's negligence are far greater than the smaller sums of money sought in an attorney's fee application. By ordering that rule 7013 be applied to the fee application matter the court can consider damages.

If the court does not cite rule 7013 and order that the rules in 9014 be applied, formally to address the counterclaim, the debtor is free to file the legal malpractice adversarial proceeding. The Fifth Circuit ruling, *Iannochino v. Rodolakis* is clearer on the issue of when the counterclaim is raised without a specific monetary figure in damages identified. The court must still subject the counterclaim to res judicata by ordering that rule 7013 be applied to the fee application matter. The other authorities the respondent has cited are not relevant to this petition.

II.

MERIT OF THIS PETITION

This case is important because at present the only way a person in bankruptcy can file a legal malpractice claim is if they manage to raise the issue at a fee application hearing and have it properly litigated. In case after case it has been found that the debtors are barred from filing a later claim if they did not raise

the issue at the hearing.

There is no notification to debtors of this procedure. There is a mandatory arbitration for all of the debtor's other creditors, except for the attorneys. When a debtor enters bankruptcy the only person the debtor is allowed to have contact with until a re-organization plan is confirmed is the attorney. The attorney is not likely to inform the debtor that the ONLY way to bring a malpractice action is to raise the issue at a fee application hearing.

These present rulings on this issue leave the bankruptcy attorney basically IMMUNE from the possibility of a malpractice suit. The attorney can be as casual as he wants in representing his clients. According to the publication Mallon and Mallon on Legal Malpractice, one third of malpractice suits involve bankruptcy attorneys. Perhaps this virtual immunity from prosecution is part of the reason.

In addition to this, the attorney can get his fees immediately in spite of the quality of his services. Unlike attorneys practicing in other courts who sometimes have to wait for years for their pay, or perhaps never get it, a bankruptcy attorney can have a debtor liquidated by the judge to pay his fees. Respondent threatened the petitioner that he would convert the case to a Chapter 7 to get the $10,000 owed to him. This is why the respondent raised the malpractice issue at the attorney's fee hearing. Respondent never would have done this but was angry because in addition to all the other damage the attorney had done he now wanted to liquidate the petitioner.

At the attorney's fee application hearing, the petitioner wanted to have the matter heard at the California Bar

Association where ethical standards are very high. The court informed petitioner that he was the only possible arbitrator. Petitioner's wariness of the court's objectivity was confirmed when he found completely in the attorney's favor based largely on a suspicious letter. Mandatory arbitration for debtors with their attorneys would offer a solution to this problem and insure objectivity, or to have the District Court arbitrate attorney's fees.

Ideally this court could take this opportunity to decide that debtors are not barred from pursuing malpractice claims if they were not raised at the fee application hearings. Persons in bankruptcy are often smart people who have accumulated some assets, but run into problems and need protection from the bankruptcy court. There is a sense of shame debtors face in addition to the fear of closing their assets. This can make them, unfortunately, perfect targets. Giving debtors the freedom to file legal malpractice counterclaims at any time would be in keeping with the spirit of the bankruptcy system to protect debtors and creditors.